148 U.S. 180

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1476~~. 775 552

THE UNITED STATES, APPELLANT,

vs.

FINNELLA M. ALEXANDER AND SOPHIA L. LITTLE.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 18, 1890.

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1 In the Court of Claims.

FINNELLA M. ALEXANDER AND SOPHIA L. Little, claimants, *against* THE UNITED STATES, DEFENDANT. } No. 14801.

I.—*Original petition.—Filed Feb.* 25, 1886.—*J. R.*

To the Court of Claims:

Said claimants petition this honorable court, and state as follows:

1. They are citizens of the United States and residents of the District of Columbia.

2. They are owners as tenants in common of all that tract of land in said District of Columbia known and described as and being lot numbered eleven (11) of original lot numbered two (2) of the subdivision made by the heirs of John Little of part of tracts called James' Park and Mt. Pleasant, as recorded in Liber "Gov. Shepherd," county, at folios 107 and 170, in the office of the surveyor of said District; and they were such owners prior to the 21st day of August, 1883.

2 3. That on the said day, the then Attorney-General of the United States published a notice in one or more of the newspapers of said District, as authorized by act of Congress approved July 15, 1882, and contained in the United States Statutes at Large, volume 22, page 168, entitled "An act to increase the water supply of the city of Washington, and for other purposes." That the said notice was to inform persons interested that the defendant proposed to condemn certain property and rights in property therein described, and to give persons damaged by such condemnation an opportunity to make their claims for the same, as provided in said act of Congress. That a part of the work to be done by the defendant was the construction of a tunnel from the present reservoir above Georgetown to a site of the proposed new reservoir near Howard University. That the said tunnel line ran near to, but not under or through, the said tract belonging to the claimants.

4. That thereafter the defendant, by its agents, officers, and employés, entered upon the work of constructing the said tunnel, which was to be of large size, made at a depth below the surface of from fifty to one hundred and seventy feet; and the said tunnel was constructed by blasting rocks and excavating, and was completed in the vicinity of claimants' said lot early in 1885.

5. The claimants' said lot was improved by a valuable dwelling-house, barn, and other buildings, and the grounds were planted with valuable shrubbery, trees, and plants; and for the accommodation of the owners and their guests and tenants a large well had long before been constructed on said lot, and had for many years furnished an abundant supply of good water for use on said premises, and the said well added great value to the said property, and the water therefrom was used by claimants for all domestic purposes for which water is necessary.

3 6. That the defendant, by the construction of the tunnel as aforesaid, which is beneath the grade of the bottom of said well and about 500 feet distant from the same, has damaged the claimants and their

said property, and destroyed the comfort and satisfaction of their said home, by thereby draining the said well of its supply of water, so that the claimants have had no water therefrom since the spring of 1885; and they believe and aver that owing to the said act of the defendant and to said tunnel their said well has been wholly drained and destroyed for all time; and that it would be useless to attempt to construct another well on any part of their said lot because of the effect of said tunnel in tapping or cutting off the veins of water that might otherwise have been reached by digging wells on said lot.

7. That not only is the said property of claimants greatly depreciated by reason of the destruction of said well, but claimants have been put to great trouble and expense in and about the work of getting water in other ways to render their said home inhabitable, and will be put to great and continuing expense in procuring water hereafter.

8. That the defendant has neither paid or offered to pay any sum whatever to the claimants for the damage so caused them and their said property by its act aforesaid in constructing the said tunnel and thereby draining and destroying the said well of water; and the claimants aver that by reason of the premises they have been damaged in their property rights aforesaid and have sustained injury thereby in the full sum of three thousand dollars, which they claim should be paid them therefor by the defendant.

9. That no assignment or transfer of said claim for damages, or of any interest therein, or of any part thereof, has been made by them;

4 that they believe they are justly entitled to recover from the defendant the said sum of three thousand dollars on account of said injury, after allowing to defendant all credits, benefits, and set-offs to which it may be entitled; and they therefore pray for judgment against the United States for three thousand dollars ($3,000), and for all such other and further relief as they may be entitled to receive under the law by reason of the facts aforesaid.

JOB BARNARD,
Attorney for Claimants, 412 5*th St. N. W.*

DISTRICT OF COLUMBIA, *ss:*

Finnella M. Alexander and Sophia L. Little, being duly sworn, on oath say, that they have read the above petition and know its contents, and that the facts therein stated of their own knowledge are true, and that those facts therein stated on information and belief they believe to be true.

FINNELLA M. ALEXANDER.
SOPHIA L. LITTLE.

Subscribed and sworn to before me this 25th day of February, 1886.
[SEAL.] EDWARD J. STELLWAGEN,
Notary Public, D. C.

5 II.—*General traverse—Filed Sep.* 22, 1886.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant, have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

6 III.—*Amendment to petition—Filed and allowed Dec.* 14, 1889.

Now come the claimants, by their attorneys, and move the court for leave to amend their petition without reswearing to or refiling the same, and do hereby amend the same by striking out the words "three thousand dollars" wherever the same occur, and inserting in lieu thereof the words "three thousand five hundred dollars."

JOB BARNARD and
GEORGE A. KING,
Attorneys for Claimants.

7 *Findings of fact and conclusion of law—Filed Dec'r* 16*th*, 1889.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

Since February 28, 1880, the claimants have been and still are the owners of a tract of land in the District of Columbia, known as lot 11 of original lot 2, of the subdivision made by the heirs of John Little, of parts of tracts called "James Parks" and "Mt. Pleasant," and containing about eight acres.

II.

On the 21st of August, 1883, the said ground was improved by a dwelling-house and other buildings, and a valuable well of water to supply the water necessary for family use and other purposes, the said property being occupied by claimants as a dwelling.

III.

On said date proceedings were begun by the publication of a notice, under the act of Congress to increase the water supply of the city of Washington (22 Stat. L., 168), to condemn a right of way for a tunnel in the neighborhood of this ground; and the Government afterward constructed such tunnel by blasting and digging, at a depth of from 150 to 170 feet below the surface, in the immediate neighborhood of the said property of claimants and about 500 feet distant from said well.

IV.

The said well had been used for many years before the construction of the tunnel; there is no direct evidence as to the effect of the tunnel on the well, but when they were constructing the same and blasting about 150 yards distant from the premises the well became dry, and has so remained. It does not appear that there was any other cause affecting the well.

V.

By reason of the construction of said tunnel the said well of water was drained and destroyed, to the damage of claimants in the sum of $3,100, no portion of which has been paid or tendered by the Government.

8

VI.

Said well at the time of its destruction was 60 feet deep, and it does not appear that it was supplied by a distinct vein of water running into it.

VII.

Said tunnel is impervious to water, and water from the outside does not seep into it. The land of claimants in which the well was located is not embraced in the map and survey prepared under said law.

CONCLUSION OF LAW.

The court determines, as a conclusion of law, that the petition be dismissed.

IV.—*Opinion.*

Weldon, J., delivered the opinion of the court:

This is a suit based directly on the provisions of an act entitled "An act to increase the water supply of the city of Washington, and for other purposes," passed July 17, 1882, and found in the Statutes at Large, page 168. It is also insisted by counsel for the claimants, that upon the general principles of the law, applicable to the appropriation of private property for public use, there is a liability on the part of defendants for the grievance complained of and established by the findings.

The facts are briefly as follows: The claimants, before and at the time, it is alleged and shown, that the defendants did the acts complained of, were the owners in fee of lot No. 11 of the original lot No. 2 of the subdivision made by the heirs of John Little of parts of tract called "James Park" and "Mt. Pleasant," as recorded in book "Gov. Shepherd, 107 and 170." On the 21st of August, 1883, the said lot was used and occupied by the claimants as a place of residence, having on it a valuable and enduring well of water. On said date proceedings were begun by the publication of a notice, under the act aforesaid, to condemn a right of way for a tunnel in the neighborhood, and near said premises. The defendants afterward constructed such tunnel, by blasting and digging, at a depth of 150 to 170 feet below the surface, in the immediate neighborhood of said property, and about 500 feet from said well.

In consequence of the construction of said tunnel, the said well became dry and has so remained. The tunnel so constructed, was in pursuance to the plan of improvement contemplated by the provisions of said statute, providing, as aforesaid, for the water supply to the city of Washington. Said well at the time of its destruction was 60 feet deep, and it does not appear that it was supplied by a distinct vein of water running into it. The damage to the said land, because of the failure of said well, was $3,100.

The first section of said act, in one of its clauses provides as follows:

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason, not having been tendered payment therefor as above provided, or who shall
9 have declined to accept the amount tendered therefor, and any person who by reason of the taking of the said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States setting forth his right of title and the amount claimed by him as damages for the property taken or the injury sustained; and the said court shall hear and adjudicate such claims in the same manner that other claims against the United States are now by law directed to be heard and adjudicated therein: Provided, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay."

The land in which the well in controversy was situated is not embraced in the survey and map, prepared under the provisions of said law.

It is insisted that the claimants do not come within the terms of the statute, for the reason the property affected is not embraced in the map and survey, and that they have no claim under and within the general jurisdiction of the court. Inasmuch as these objections go to the power to maintain the suit, it is proper that they should be disposed of, as preliminary to the discussion of the rights of the parties on the legal aspects of the claim.

It will be observed that the phraseology of the law contemplates two distinct classes of claimants; first, those whose lands are taken and appropriated by the construction and occupation of the tunnel, and those whose "property right" shall be "directly injured" by the construction of the works. And further, in providing for a jurisdiction in this court, the statute says:

"Any such person may at any time within one year from the publication of said notice by the Attorney-General, as above provided, file a petition in the Court of Claims of the United States, setting forth his right of title and the amount claimed by him as damages for the property taken or the injury sustained."

The terms of the statute are sufficiently comprehensive to embrace not only claims for damages growing out of the physical taking or trespass to property, but also all damages which might result from the construction and location of the tunnel, which could be considered at common law consequential and not immediate, unless limited by the term "directly injured."

If the claimants have a right to maintain this proceeding it must be under the peculiar provision of the law under which the work was prosecuted, and from which, it is alleged, the damage or injury has originated.

The theory upon which it is sought to recover, that there was a taking of property within the meaning of the Constitution of the United States, requiring just compensation to be made to the owner, can not be maintained on the facts of the case. There was no taking of property by the defendants as against the claimants. Whatever was done was an injury to a peculiar species of property, not in the possession of the claimants, and not their absolute property, but property in, which they had an inchoate right, which in course of time might come into their possession and subject to their dominion as owners of a usufruct.

The case of Russell (7 C. Cls. R. 227), and the Great Falls Manufacturing Company (112 U. S. R., 645), were both cases in which there had been a specific appropriation, and conversion of physical property belonging to the claimants, to the use and behoof of the Government. The case of Pumpilly vs. Green Bay Company (13 Wall., 166) is the nearest approach to the claim that every deprivation of a right of property is a taking within the meaning of the Constitution; and yet that case falls far short of establishing the doctrine in its fullest extent. The court says:

"And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.

"It is not necessary that property should be absolutely taken in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.

"The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation.

"This proposition is sustained by the decisions of the supreme court of Wisconsin, construing the provision of the constitution of that State on the subject, and by many adjudged cases in this country.

"The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one, in its proper application to many injuries so originating."

Hence we conclude, in the absence of the special statute, there is no law authorizing this court to hold that the facts constituted a taking of private property, for public good, within the meaning of the Constitution of the United States, so as to authorize us to give judgment for the value of the property affected.

The discussion is, therefore, limited to the effect of the statute upon the rights of the parties. What rights did the statute give the claimants, and what liabilities has it placed on the defendants? From what has already been said, it follows that, without the statute, no jurisdiction could be exercised by this court to grant relief to claimants, however much they may have suffered in consequence of the construction of the tunnel. In the

absence of express provision to that effect, it is safe to conclude that Congress, in the passage of the law, did not intend that the United States should assume, towards the claimants, greater liability than would attach to an individual or ordinary corporation that had [J. R.], as adjoining owner, have done in effect what was done by the defendants. In giving this court jurisdiction, by special enactments, to try claims sounding in tort, it has never been held that Congress intended to amplify or enlarge the responsibility of the Government beyond the legal liability of persons, either natural or artificial. The statute simply provides a remedy against the United States, and brings them within the judicial jurisdiction of their own Government, there to answer to the citizen, according to the measure that determines the responsibility of private parties.

If, therefore, an individual, as an adjoining owner, would not be liable for the grievances complained of, it must follow that there would be no liability attaching to the United States for doing the same thing, unless it is so expressed or implied in the statute. We have examined the many decisions of the different courts, upon the question of the liability of the owners of land, who, in the enjoyment of their estate, have affected the interests of adjoining owners, and do not find a uniformity of opinion upon that subject.

If the damage to the estate of the claimant, was the result of the ordinary use of the adjoining land by its owner, the question of liability might be less difficult, but the building of a tunnel of immense magnitude, to
11 supply a reservoir for the use of a large city, is an extraordinary use of the land occupied by the tunnel, and the question arises does that use differentiate the case so as to affect the law? The case of Acton vs. Blendel, 12 Meeson and Welsby, 335, decided in 1843, in the Exchequer Chamber, is a leading case upon some of the questions involved in this controversy. The plaintiff sued because of the acts of an adjoining owner, complaining that the water supply which he had used for the use of his cotton mill had been, by the sinking of a coal pit, destroyed.

In a very lengthy opinion the court concludes as follows:

"We think this case, for the reasons given, is not to be governed by law which applies to rivers and flowing streams, but that it rather falls within the principle which gives the owner of the soil all that lies beneath the surface; that the land immediately below is his property whether it is solid rock or porous ground or venous earth or part soil, part water; that the person who owns the soil may dig therein and apply all that is there found to his own purposes at his free will and pleasure, and that if, in the exercise of such right, he intercepts and drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which can not become the ground of action."

In the case of Wheatly vs. Baugh (25 Penn. State Reports, p. 528) the court says:

"Where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it to the injury of the person below on whose land it issues in the form of a spring.

"But where the spring depends for its supply upon percolations through the land of the owner above, and in the use of the land for mining or other

lawful purposes the spring is destroyed, such owner is not liable for the damages thus done unless the injury was occasioned by malice or negligence.

"The prior use of the spring for the purposes of a tannery conferred no right of servitude over or through the land of the adjacent proprietor.

"Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress."

In the case of Dickinson and others v. The Grand Junction Canal Company (7 Exch., 282) it is held, first, that at common law the company was liable to an action for obstructing the water, which actually had formed part of the stream of the river by sinking the well. Secondly, that an action would lie against it at common law for the obstruction of water which did not form part of the river, but was prevented in so doing in its natural course by the excavation of the well, whether the water was part of an underground water-course or percolated through the strata. Of this case it is said by a learned writer on the subject of water-courses: "Though generally regarded as erroneous, and therefore not to be followed, so far as it undertakes to decide concerning waters percolating through the strata of the earth has been generally approved in subsequent cases in its views of the law respecting water flowing in defined channels beneath the surface." (Angell on water-courses, seventh edition, 150.)

The same court in Broadbent v. Ramsbotham (11 Exch., 602) said:

"No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He can not, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

The case of Benjamin v. The Boston and Maine Railroad Com-
12 pany (3d Cushing, 107), cited in the argument by the counsel for the claimant, is a case in which the liability of the defendant turned upon the construction of a statute, and in the decision of the common law question the court said:

"And so in regard to the well. The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is damnum absque injuria. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

In this case the United States acquired the absolute title to the land condemned and appropriated for the construction of the tunnel, as we must infer, because of the requirements of the statute, and in that particular differs from the defendant in the case just cited. The statute in that case provided that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road,

or by taking any lands or materials, as provided in the preceding section." It will be seen that the liability of the railroad company turned on the construction of the local statute of Massachusetts in relation to railroad companies. The opinion is by Chief-Justice Shaw, and the fact that he does not refer to the particular use to which the adjoining close was subjected, is an indication that the lawful use of the premises, without a malicious purpose to injure, will protect the owner from all claim for damages.

The case of Trowbridge v. Inhabitants of Brookline (144 Mass., 139) turns also upon the construction of a statute.

When the United States acquired title to the land embraced within the survey and map they succeeded to whatever rights the former owner had in the premises; and if such owner would not be liable, then, as we have before said, Congress not intending to enlarge the liability of the Government beyond that which measures the responsibilities of individuals, the defendants are not liable in this proceeding. In the case of Haldemann v. Bruckhart (45 Penn. State Reports, p. 514) the distinguished jurist, Mr. Justice Strong, discusses the question with marked ability, and that decision follows the line indicated by Justice Lewis in the case of Wheatley v. Baugh (25 Penn. State Reports, 528).

The court says:

"Throwing out of view for the present such exceptional cases, there is a well-marked distinction between a flowage of water in surface and subsurface channels. A proprietor of land may, in the proper use of his land for mining, quarrying, building, draining, or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor without any responsibility to that neighbor. * * *

"We are not, however, to be understood as intimating that any owner may maliciously or negligently divert even an unknown subterranean stream to the damage of a lower proprietor. But in the enjoyment of his land he may cut drains, or mine, or quarry, though in so doing he interfere with the flowage of water in hidden, unknown, underground channels."

If, therefore, an injury is caused by the lawful use of land by its owner or occupant which results in disturbing the flowage of water caused by percolation, and thereby a well on an adjoining lot is deprived of a supply of water, it is an injury for which there is no liability, and the doctrine of damnum absque injuria applies.

13 The remaining inquiry is, has the statute changed the law so that a new liability has been created? Did Congress intend to establish for the Government a higher grade of liability than that recognized for individuals at common law? The common law, crude and even barbarous, in the commencement, in some of its provisions, has endured with its accumulating improvements and modifications for ages; and in its fundamental theories, as they now exist in this country, it must be regarded, in the absence of statutory provisions, as affording the best system of municipal law, regulating the duties and determining the rights of parties litigant.

For persons whose lands do not fall within the boundary of the map and survey Congress has provided a remedy and compensation in the provision "any person who, by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right."

The contention of the claimants is in derogation of the common law, and their theory should distinctly appear from the terms of the statute. In this connection we are called upon to give construction to the words "directly injured in any property right." The damages complained of are not remote, but are they direct as contradistinguished from consequential? If Congress used the word "directly" as opposed to "consequentially," the construction must be against the contention of the claimants.

In the distinction between trespass and trespass on the case is discussed more fully that in any other connection the difference between "consequential" and "immediate" injury; and while it may have been a distinction founded on the subtlety of pleading, it is important at this time in ascertaining the legal signification of the words used in this statute. The word "directly" was inserted in the law to limit the word "injured" and exclude therefrom the consideration of every species of damage except "direct." It can readily be seen that in the construction of a work of such magnitude many injuries could be directly inflicted on the adjacent and adjoining owners. Material from the excavation, and used in the superstructure, might have been placed on the lands adjacent, fences and houses might have been destroyed, or rendered useless in their occupation, because of the possession of land beyond the limit of the survey and map.

While the term direct damage is unknown in legal classification, it has its complement in the term immediate in contradistinction to consequential. (Chitty, vol. I, 149.)

Testing the rights of the claimants by the rules of pleading, which have been thought to be the perfection of logic, they would be compelled to sue in an action in the case for the grievances complained of, for the reason that no direct force was employed by the defendants against their property rights, and whatever damages they suffered are not direct or immediate, but consequential. In view of what are the best and highest authorities as to the liabilities of individuals; that Congress intended to place the defendants on an equality of rights with persons; that the terms used exclude, as a cause of action, the injury shown by the findings, we conclude that the grievance is damnum absque injuria. It is the judgment of the court that the petition be dismissed.

14 *Judgment of the court.*

At a Court of Claims, held in the city of Washington, D. C., on the 16th day of December, A. D. 1889, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge, and decree that the petition of the claimants be dismissed.

15 VI.—*Motion for new trial.—Filed Febr'y* 3, 1890.

Now come the claimants, Finnella M. Alexander and Sophia L. Little, by their attorneys, and move the court to set aside the judgment entered herein on the 16th day of December, in the year 1889, dismissing their

petition and to grant a new trial, and in support of this motion assign the following ground:

Error of law in holding that the United States is not liable as for a direct injury to the property rights of the claimants under the act of Congress approved July 17, 1882, in drying up their well by the construction of a tunnel.

JOB BARNARD,
Attorney of Record for Claimants.
GEORGE A. KING,
Of Counsel.

16 VII.—*Argument and submission of motion for a new trial.—Mch.* 12, 1890.

F. M. ALEXANDER ET AL. *vs.* THE UNITED STATES. } No. 14801.

At a Court of Claims, held at the city of Washington, D. C., on the 12th day of March, A. D. 1890, the motion for a new trial in this case was argued by Mr. King for the motion and by Mr. Dewees opposed and submitted.

17 VII.—*Opinion on motion for new trial—Filed April* 28, 1890.

MOTION FOR A NEW TRIAL.

Weldon, J., delivered the opinion of the court.

This case was tried at the present term and a judgment rendered against the claimants. The motion is made to reverse our former determination upon the ground that the court was mistaken in its view of the law.

The suit is based directly on the provisions of an act entitled "An act to increase the water supply of the city of Washington, and for other purposes," passed July 17, 1882, and found in the Statutes at Large, page 168. It is also insisted by counsel for the claimants, that upon the general principles of the law applicable to the appropriation of private property for public use there is a liability on the part of the defendants for the grievance complained of, and established by the findings.

The facts are briefly as follows: The claimants, before and at the time it is alleged the defendants did the acts complained of, were the owners in fee of lot No. 11 of the original lot No. 2 of the subdivision made by the heirs of John Little of parts of tracts called "James Park" and "Mt. Pleasant," as recorded in book "Gov. Shepherd, 107 and 170." On the 21st of August, 1883, the said lot was used and occupied by the claimants as a place of residence, having on it a valuable and enduring well of water. On said date proceedings were begun by the publication of a notice, under the act aforesaid, to condemn a right of way for a tunnel in the neighborhood and near said premises. The defendants afterward constructed such tunnel, by blasting and digging, at a depth of 150 to 170 feet below the surface, in the immediate neighborhood of said property and about 500 feet from said well.

In consequence of the construction of said tunnel the said well became

dry and has so remained. The tunnel so constructed was in pursuance to the plan of improvement contemplated by the provisions of said statute, providing, as aforesaid, for the water supply to the city of Washington. Said well at the time of its destruction was 60 feet deep, and it does not appear that it was supplied by a distinct vein of water.

The first section of said act, in one of its clauses provides as follows:

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason, not having been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who by reason of the taking of the said land, or by the construction of the works hereinafter directed to be constructed shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition
18 in the Court of Claims of the United States setting forth his right of title and the amount claimed by him as damages for the property taken or the injury sustained; and the said court shall hear and adjudicate such claims in the same manner that other claims against the United States are now by law directed to be heard and adjudicated therein: Provided, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay."

The land in which the well in controversy was situated is not embraced in the survey and map prepared under the provisions of said law.

It is insisted that the claimants do not come within the terms of the statute, for the reason the property affected is not embraced in the map and survey; and that they have no claim under and within the general jurisdiction of the court. Inasmuch as these objections go to the power to maintain the suit, it is proper that they should be disposed of, as preliminary to the discussion of the rights of the parties, on the merits of the claim.

It will be observed that the terms of the law contemplate two distinct classes of claimants; those whose lands are taken and appropriated by the construction and occupation of the tunnel, and those whose "property right" shall be "directly injured" by the construction of the works. And further, in providing for a jurisdiction in this court, the statute says:

"Any such person may at any time within one year from the publication of said notice by the Attorney-General, as above provided, file a petition in the Court of Claims of the United States, setting forth his right of title and the amount claimed by him as damages for the property taken or the injury sustained."

The terms of the statute are sufficiently comprehensive to embrace not only claims for damages growing out of the physical taking or trespass to property but also all damages which might result from the construction and location of the tunnel, which could be considered at common law consequential and not immediate unless limited by the term "directly injured."

Since the former decision and the very able arguments of the motion for a new trial, and in other cases of a like kind, the court has re-examined the questions arising on the statute and the authorities affecting the rights of the parties.

Having determined that the statute is sufficiently broad to give the court jurisdiction of damages arising outside of the survey and map, the question remaining for us to decided is, do the facts constitute a cause of action on the part of the petitioner for which a recovery can be had in this proceeding? The discussion in this connection is limited to the effect of the statute. What right does the statute give the claimants, and what liabilities has it placed on the defendants? Ordinarily it is safe to assume that Congress, in the passage of a law, does not intend that the United States should assume a greater liability than attaches to a transaction of the same kind between individuals; but this is a general rule to which there are exceptions. Carroll *vs.* United States (22 C. Cls. R., 104).

That was a suit under a law of Congress giving the court jurisdiction to determine the amount of damages incident to the improvement of the streets of Washington by the District of Columbia; and in the decision of the cause the court said: "The doctrine is indisputable that a municipal corporation is not liable to an adjoining owner for consequence incident to the improvement of the street, so long as there is no encroachment on the possession of the owner and the corporation is guilty of no negli-
19 gence," yet the court held, both on demurrer and in the trial of the cause, that Congress had waived the exemption of the District by the terms of the statute. So in this case it may be that for the grievance complained of, there would be no liability against an individual or a private corporation, yet by the terms of law Congress may have recognized such a liability on the part of the defendants.

In the case of Cummings, it was held by the Supreme Court that the statute did not waive the exemption of the United States from responsibility for the torts of public officers; but simply intended to submit to the adjudication of the court, the question of liability, and the extent of the damages. But the opinion, on that question, was by a divided court. (Cummings vs. United States, 130 U. S., 452.)

In the absence of a provision or implication to that effect, it is safe to conclude that Congress, in the passage of the law, did not intend that the United States should assume towards the claimants greater liability than would attach to an individual or ordinary corporation that had, [J. R.] as adjoining owner, done in effect what was done by the defendants.

We have examined many decisions by different courts upon the question of liability of the owners of land, who, in the enjoyment of their estate, have affected the interest of the adjoining owners, and do not find a uniformity of opinion on that subject.

In the view which we now take of the question involved in the controversy, it is not necessary that we should pass upon the question of what, at common law, would be the rights and liability as between individuals upon the facts of this case.

Eliminating from the discussion the question whether from the facts there would be a liability against a person or ordinary corporation, we come to consider the rights of the parties under the provisions of the statute, conferring jurisdiction on the court, to hear and determine the alleged cause of action, because of the construction of the tunnel.

The statute provides "any person who by the reason of taking said land or by the construction of the works hereinafter directed to be constructed should be directly injured in any property right."

The facts found by the court establish that the claimant's well was destroyed by the construction of the tunnel, and the only question for us to decide is, Can the damages be recovered against the United States in this proceeding? In our first view of this case, we held that the word direct intended to discriminate against consequential damages, and, for that class of damage no liability attached to the defendants. In the reconsideration on the motion for a new trial, we have more thoroughly considered the phraseology of the statute upon the question of damages.

There is no doubt as to the injury, but it is the consequential consequence of the construction of the tunnel, and not the immediate result of any force used directly against the property rights of the claimants. Consequential damages are as directly traceable to a cause as are immediate; but as they do not follow immediately they are classified as consequential. The term "direct damages," which would be the result of "directly injured," is not a classification known to the law, in the division of the different kinds of damages. If the words "directly injured" are used in the statute in contradistinction to "remotely injured," then the right to the claimants to recover is clear.

The rule which fixes the limit of compensation, in cases where positive injury results from alleged wrong, prohibits any allowance for damages remotely resulting from the principal illegal act.

"Such damages are frequently termed remote damages and sometime' consequential damages. These terms are not, however, necessarily synonymous, or to be indifferently used; all remote damages are consequential, but all consequential are by no means remote." (Sedgwick on the measure of damages, Vol. I, page 90.)

Consequential damages are defined to be "those which, though directly, are not immediately consequential upon the act or default complained of" (Bouv. Law Dic., page 467). The term consequential relates more particularly to the point of time rather than to the relation with the illegal act complained of, as the cause of the injury.

This distinction is made more clearly in the law applicable to the subject of pleading, in the distinction between trespass and trespass on the case.

In our former decision we regarded the word "direct" as a limitation upon the subject of damages, and as intending to discriminate against what at common law would be consequential, and not immediate damages.

The damages proved in this case are not immediate upon the act or default complained of, but are they not direct, within the meaning of the statutes?

The words "directly injured" must have been intended by the legislature to perform some function of limitation or qualification upon the character of damages which might be claimed, as resulting from the work contemplated by the statute.

"The good expositor," says Lord Coke, "makes every sentence have its operation to suppress all the mischief; he gives effect to every word in the statute; he does not construe it so that anything should be vain and superfluous, nor yet makes exposition against express words." (Dwarris on Statutes, 577.)

"In the Bowen Case (14 C. Cls. R., 173), affirmed on appeal (100 U. S., 508), this court held that the introduction into a section of the Revised Statutes of the single word 'such,' which was not in the original act, there

revised and re-enacted, completely changed the law, and that decision was affirmed by the Supreme Court" (Fisher vs. United States, 15 C. Cls., 327).

Although the authorities are well settled that for damages remotely incident to the illegal act, there can be no recovery, yet we are induced to the conclusion that in the use of the term "directly injured" Congress intended to legislate against the claims for damages not directly traceable to the construction of the work authorized by the terms of the law.

The use of the land embraced in the line of the tunnel was a most extraordinary use, the bottom of the tunnel being 170 feet below the surface near the premises of the claimants, and it is not at all remarkable that the well of the claimants should suffer as it did, as the direct result of the construction of the tunnel. The facts stated in the findings clearly show that the destruction of the well is directly traceable to the excavation of the ground for the purpose of the tunnel.

From the re-examination of the question of the liability of the defendants for damages, which are unquestionably the result of their acts, we determine that Congress intended to limit the responsibility of the defendants against such damages as might be remotely connected with the work contemplated by the act, and not against consequential injury which might directly result from the prosecution of the work.

21 As to whether the defendants would be liable in this case under that provision of the Constitution protecting private property from public appropriation, without compensation to the owners as contended by claimants, is not necessary for us to determine; it is sufficient for the present purpose, that we hold, that under the statute upon which this claim is based, parties injured in the way shown by the findings have a right to compensation.

The motion for a new trial will be granted, and as the allowance of motion opens the whole case, the parties will be heard upon the question of damages, on such proof as may be offered.

22 VIII.—*Allowance of motion for a new trial—Apr.* 28, 1890.

F. M. ALEXANDER ET AL. *vs.* THE UNITED STATES. } No. 14801.

At a Court of Claims held at the city of Washington, D. C., on the 28th day of April, A. D. 1890, it was ordered that the claimants' motion for a new trial be allowed.

23 IX.—*Re-argument and submission of case—May* 26, 1890.

F. M. ALEXANDER ET AL. *v.* THE UNITED STATES. } No. 14801.

At a Court of Claims held at the city of Washington, D. C., on the 26th day of May, 1890, this case was argued and submitted.

24 X.—*Findings of fact and conclusion of law—Filed June 9, 1890.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

Since February 28, 1880, the claimants have been and still are the owners of a tract of land in the District of Columbia, known as lot 11 of original lot 2, of the subdivision made by the heirs of John Little, of parts of tracts called "James Parks" and "Mt. Pleasant," and containing about eight acres.

II.

On the 21st of August, 1883, the said ground was improved by a dwelling-house and other buildings, and a valuable well of water to supply the water necessary for family use and other purposes, the said property being occupied by claimants as a dwelling.

III.

On said date proceedings were begun by the publication of a notice, under the act of Congress to increase the water supply of the city of Washington (22 Stat. L., 168), to condemn a right of way for a tunnel in the neighborhood of this ground; and the Government afterward constructed such tunnel by blasting and digging, at a depth of from 150 to 170 feet below the surface, in the immediate neighborhood of the said property of claimants, and about 500 feet distant from said well.

IV.

The said well had been used for many years before the construction of the tunnel; there is no direct evidence as to the effect of the tunnel on the well, but when they were constructing the same and blasting about 150 yards distant from the premises the well became dry, and has so remained. It does not appear that there was any other cause affecting the well.

V.

By reason of the construction of said tunnel the said well of water was drained and destroyed, to the damage of claimants in the sum of $1,500, no portion of which has been paid or tendered by the Government.

25 VI.

Said well at the time of its destruction was 60 feet deep, and it does not appear that it was supplied by a distinct vein of water running into it.

VII.

Said tunnel is impervious to water, and water from the outside does not seep into it. The land of claimants in which the well was located is not embraced in the map and survey prepared under said law.

CONCLUSION OF LAW.

Upon the foregoing facts the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of fifteen hundred dollars.

26 XI.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 9th day of June, A. D. 1890, judgment was ordered as follows:

The court on due consideration of the premises find in favor of the claimants, and do order, adjudge, and decree that the said Finnella M. Alexander and Sophia L. Little do have and recover of and from the United States the sum of one thousand and five hundred dollars ($1,500.00).

27 XII.—*Application of defendants for and allowance of appeal.—Filed June* 11, 1890.

From the judgment rendered in the above-entitled cause on the 9th day of June, 1890, in favor of claimants, the defendants, by their Attorney-General, on the 11th day of June, 1890, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed in open court June 11, 1890.

WILLIAM A. RICHARDSON,
Chief-Justice.

28 XIII.—In the Court of Claims.

FINNELLA M. ALEXANDER AND SOPHIA L. Little, *vs.* THE UNITED STATES.	No. 14801.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, filed December 16, 1889, of the judgment of the court entered of the same date, of the order setting aside said judgment and granting a new trial, dated April 28, 1890, of the findings of fact and conclusion of law filed June 9, 1890; of the final judgment of the court entered June 9, 1890; of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 14th day of October, A. D. 1890.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1476. The United States, appellant, *vs.* Finnella M. Alexander and Sophia L. Litttle. Filed October 18, 1890. Court of Claims. Supreme Court U. S. Clerk's office. Received Oct. 18, 1890.

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
FINNELLA M. ALEXANDER AND
Sophia L. Little.
No. 552.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
FINNELLA M. ALEXANDER AND
Sophia L. Little.
No. 552.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This suit was brought in the Court of Claims under the provisions of the act of July 15, 1882, entitled "An act to increase the water supply of the city of Washington, and for other purposes," 22 Stat., 168. The time within which the suit might have been brought having expired, Congress, on February 26, 1885 (23 Stat., 332), removed the limitation and extended the period for filing petitions to Febuary 26, 1886.

In order to comply with the terms of the statute, it became necessary to construct a reservoir on the high ground north of the city of Washington, near Sixth street extended, and also to make some additional improvements by constructing a dam across the Potomac River at Great Falls. In addition to this, the Aqueduct had to be extended from its then present eastern terminus to the high ground just mentioned.

On the 21st of August, 1883, proceedings were begun for the purpose of condemning a right of way for a tunnel, which was afterwards constructed at a depth of from 50 to 170 feet below the surface of the ground. The course of the tunnel was such as not to include appellees' land within the surveys; but it is alleged that a certain well of the depth of 60 feet and of great value on said land, which had for a long time previous been filled with good water, became dry during certain blasting, while the tunnel was in process of construction, and about 500 feet distant from said well.

The well remaining permanently dry, appellees brought suit in the Court of Claims to recover $3,500 damages, under a section in the foregoing act alleged to give the court jurisdiction to hear and determine suits for injuries resulting from the construction of said reservoir and aqueduct. The case came on for trial, and, after argument, the court, on the 16th day of December, 1889, entered a judgment dismissing the petition on the ground that the grievance complained of constituted a *damnum absque injuria*.

On the 12th of March, 1890, a motion for a new trial on behalf of the appellees was made and submitted to the

court, and on the 28th day of the following month it delivered an opinion granting the motion for a new trial on the ground that upon a reëxamination they "determine that Congress intended to limit the responsibility of the defendants against such damages as might be remotely connected with the work contemplated by the act, and not against consequential injury which might directly result from the prosecution of the work."

On the 26th day of May, 1890, the case was reargued and submitted, and on the 9th day of June following findings of fact and conclusion of law were filed by the court, reversing the former decision, and giving judgment for appellees for the sum of $1,500. From this judgment the present appeal is prosecuted on behalf of the United States.

ASSIGNMENT OF ERROR.

The Court of Claims erred in its conclusion of law on the facts found in giving judgment for the claimants for the sum of $1,500.

BRIEF OF ARGUMENT.

I.

THE COURT OF CLAIMS WAS WITHOUT JURISDICTION OF THE SUBJECT-MATTER, FOR THE REASON THAT APPELLEES' LAND IS NOT EMBRACED BY THE SURVEY.

While at first glance it may not seem clear that under the act of July 15, 1882, the legislature intended to restrict the right to sue exclusively to the parties within the survey, a close examination of the facts and of the law removes any doubt.

In *Pennington* v. *Coxe* (2 Cranch, 33, 52) Chief Justice Marshall said:

> That the law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged. * * * It is the duty of the court to discover the intention of the legislature and to respect that intention (p. 59).

The Chief Justice, in the same volume, in *United States* v. *Fisher* (p. 386), said:

> It is undoubtedly a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the legislature to be constructed upon the whole. * * *
>
> Where rights are infringed, where fundamental principles are overthrown, where the *general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to affect such object* (p. 390).

Appellees urge that the clause, "And any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, etc.," comprehends a distinct class of suitors, and that it was the intention of Congress to open the doors of the court not alone

to the persons whose property was taken, but others outside, and that it made no difference however remote they may have been from the land taken.

The act under consideration among other things provides, that the Attorney-General "shall proceed to ascertain the owners or claimants of the premises *embraced in the survey*" and cause their names to be published in one or more of the daily newspapers issued in the District of Columbia, and upon his request "the chief justice of the supreme court of the District of Columbia shall appoint three persons * * * to act as appraisers," to fairly and justly value the land within the survey, and then the Attorney-General being satisfied as to the title to the same, shall cause a tender to be made to the parties mentioned therein, "and if the offer be accepted, then upon the execution of a deed to the United States in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act." It further provides, that "Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason not have been tendered payment therefor," and "any person, who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims, etc."

It is observed that the legislature used the phrase "the owners or claimants of the premises embraced in the sur-

vey," and a little farther on in the same section the same intent is expressed in slightly different language when it uses the phrase "any person or corporation having any estate or interest in any of the lands embraced in said survey and map."

It is clear that the intention of Congress was, first, that the parties within the survey alone were to receive remuneration for the land taken if the appraisement was satisfactory, and secondly, if for some reason it was not, or the money was not tendered, then they should have recourse to the Court of Claims for redress. Immediately following the last phrase above mentioned, and under which the Court of Claims took jurisdiction, is "and any person who by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right," etc. It is contended by appellees that it was the intention of Congress to afford a remedy to a distinct class of litigants not before mentioned, so as to include themselves.

It is observed that Congress has twice specifically designated what persons should have the right to be compensated, or if not compensated to have recourse to the Court of Claims for redress, and it is clear that the phrase under which appellees seek to recover was not intended to comprehend those remote from the survey, but those within. It was the persons within the survey alone who could be dissatisfied with the allowance of the appraisers, and it was they who could "not have been tendered payment," and not persons remote from the tunnel and outside the survey. Congress clearly intended to extend the jurisdiction of the court to the former class only.

It is clear that they had but one idea in view, namely, that if the parties whose lands were taken, and who were injured in any property right, did not receive satisfaction, they might have the decision of the appraisers reviewed by the Court of Claims.

Had it been the intention to enlarge the scope of the investigation of the court as compared with that of the appraisers, Congress would have definitely said so, and not left their desire so obscure as to require a judicial determination in order to discover such intention. And further, if the desire was to comprehend those remote from the survey, provision would have been made to enable the appraisers to assess the value of any direct injuries such parties incurred, for they were as well acquainted with the land without as within the survey, and the restriction would not have been made to the one class. Had they not been competent for the one purpose, they would not have been for the other, and it is reasonable to suppose that the intention of Congress was to permit but one class to appear before the appraisers, and not that this same class and another and a distinct one not before thought of should have the right to have a hearing in the Court of Claims; but the fact is, the court was to review the decision of the appraisers alone.

Chief Justice Waite, in *Tillson* v. *The United States* (100 U. S., 43, 46), said:

> We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court to give a judgment against the United States at least

> for interest, in case it should be found that payments on the contracts held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, *it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power.*

In the same line as the foregoing case is that of *Slidell* v. *Grandjean* (111 U. S., 412, 437), in which the law is even more forcibly treated. Mr. Justice Field said:

> The position of the plaintiffs, that Congress must have intended to include all reports made by the board, because under the act of 1805 a majority of its members were authorized to act upon and determine the validity of claims presented, does not strike us as a logical conclusion. It would rather seem to strengthen our construction, for by naming decisions made by the three commissioners, the act indicates that Congress intended to refuse a confirmation of decisions made by two of them. * * * It is also a familiar rule of construction that where a *statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms,* or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated *that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to.* The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 536; *Dubuque and Pacific R. R. Co.* v. *Litchfield*, 23 How.,

66, 88; *The Delaware R. R. Tax*, 18 Wall., 206. *The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.*

Giving the privilege to a litigant to resort to the Court of Claims to recover damages for an act under which a private individual would not be liable is certainly the "relinquishment of a public interest." Since the expression used is ambiguous, and a doubt exists as to the intention of the legislature, this case is clearly in point, and "that construction should be adopted which will support the claim of the Government rather than that of the individual."

That the Congressional Record may be properly consulted for the purpose of ascertaining the circumstances to aid in the construction of an act is established by this court in its decision in the *American Net and Twine Company* v. *Worthington* (141 U. S., 468, 473), where it is said:

> While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount. (*Jennison* v. *Kirk*, 98 U. S., 453, 459; *Blake* v. *National Banks*, 23 Wall., 307, 317; *The Collector* v. *Richards*, 23 Wall., 246, 258; *Gilmer* v. *Stone*, 120 U. S., 586, 590; *United States* v. *Union Pacific R. R. Co.*, 91 U. S., 72, 79.)

Again, in *ex parte Farley* (40 Fed. Rep., 66, 69) the circuit court of the United States for the western district

of Arkansas said, after quoting from the remarks of Mr. Culbertson, of the House, in the Congressional Record:

> This is the language of one of the lawmakers; the language of the gentleman who, as chairman of the Judiciary Committee of the House, had charge of the bill in that branch of the lawmaking power. The statements of those who had charge of the law, made to the legislative body passing it, as to its meaning and purpose, are always competent.

Senator Harris had charge of the bill in the Senate and introduced the report relative to the construction of the works necessary for the purposes mentioned in the act.

Referring to the Congressional Record, page 4206, first session Forty-seventh Congress, the following discussion took place in the Senate:

> Mr. McMillan. * * * It leaves it then to the option of the owners of the land whether or not they shall accept the amount of damages so determined by the appraisers, and there it drops the whole appraisement. No appeal from the report of the appraisers is provided for. The appraisement has terminated; that is the end of it. There is no confirmation of the report of the appraisers or any judgment upon that report. But the bill permits *any person having an interest* in any portion of the *premises*, within a year after notice is given by the Attorney-General, to institute a suit in the Court of Claims for the recovery of any *damages* which he may claim for the *property* or *right* so *taken*. * * *
>
> The effect of this bill is merely to refer to the Court of Claims any claim for damages which these parties may have, and it gives them an entire year within which to institute their proceedings in the Court of Claims.

Mr. HARRIS. * * * I see no reason why we should require the owner to take his appeal or petition to the Court of Claims or any other judicial tribunal for a review upon the question of damage, or value within less time than a year; but I certainly have no objection to the Senator moving to strike out "one year" and suggesting any time that he thinks reasonable.

I do not see the necessity of providing for any appeal to another commission or jury after one has determined the question. The amendment provides that after the valuation has been fixed by the commission the Attorney-General shall tender the money and receive a deed. Then the very last clause of the amendment provides that the title to the property condemned shall vest absolutely in the United States from the date of its condemnation. I do not think there is any difficulty, and I think the ends of justice between the Government and the owners of the property will be as surely reached by this method of proceeding as by any method that can be devised. * * *

Mr. BAYARD. * * * I do not like the idea proposed by the amendment of the Senator from Tennessee, that after the award shall be made and the condemnation to that extent shall have been made, any dissentient party can go into the Court of Claims and recover just what he can prove. In other words, we are creating lawsuits; we are not settling claims.

Mr. HARRIS. * * * I think still the machinery is perfectly simple and does protect and secure the rights of both the Government and the property owners as perfectly as any machinery can do. If the time for appeal from the decision of the jury or the commissioners is too long, I have no objection to shortening it. * * *

Mr. SHERMAN. * * * It seems to me when you make an *ex parte* appraisement of this kind you should give to the owner of the land some right to review that decision; that you should give him an opportunity to be heard. These appraisers may not give him a fair chance. Therefore, you do what? You refer it to the Court of Claims, a court in this city which can hear testimony, and you allow that *court to review the appraisement.* If we should adopt the provision for the condemnation of the site for a Library building, we should have each case tried by a jury of citizens selected here to assess the damages done by the establishment of this aqueduct. I do not believe that would be a safe proceeding.

It seems to me the committee have adopted a very cautious and a very prudent course, except in regard to one point, which is open to criticism. I think the report of the appraisers ought to be submitted to a judge of the supreme court of the District, or to the court itself, and allow that court to pass upon the appraisement. It might not be reasonable and that court might set aside the appraisement. Certainly we must give the private citizen a right of appeal to some tribunal which can review the decision of the appraisers, and it can only be done in the supreme court of the District or in the Court of Claims, and I greatly prefer in the interest of the Government the Court of Claims.

Mr. HOAR. * * * I ask the attention of the Senator from Ohio to this provision of the pending amendment: "Any person who * * * shall be directly injured in any property right may * * * file a petition in the Court of Claims of the United States."

Mr. SHERMAN. If *any person whose property is taken is not satisfied with the report of the appraisers, then he may sue in the Court of Claims for the amount*

of damages. It seems to me it is better to trust this matter to the Court of Claims than to trial by jury in the supreme court of the District.

Mr. McMillan. The amendment reads that any any person may "file a petition in the Court of Claims of the United States, setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjucate such claims," etc. That includes all the questions of title, all claims affecting it, and all the damages which the party may have suffered.

Mr. Justice Wayne, in *United States* v. *Freeman* (3 How., 556, 565), said:

> Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words (*Winbish* v. *Tailbois*, Plowd., 57). A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter (*Stowell* v. *Zouch*, Plowd., 366). These citations are but different illustrations of the rule that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed, the limitation of the rule being that, to extend the meaning of any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded and not only within a like reason.

A case almost in point, where a right of way was taken and an indirect injury resulted, is that of *Clark* v. *The Town of Saybrook* (21 Conn., 313, 322). This was an action

brought by Clark against the town for the alteration of a public highway; the court, in speaking of the statute under which the suit was brought, said that the county commissioners—

> After taking the oath and giving the notice therein prescribed, "if they shall be of opinion that such highway or road will be of common convenience and necessity shall proceed to survey and lay out the same, and assess the damage which will thereby accrue to individuals;" and thereupon they are to make their report in writing of their doings, and return the same to the county court; and that, "if any person shall complain of the assessment of damages, he may move for a jury to reassess the same" (p. 341). The terms here used, if they are to be taken in an unqualified and unrestricted sense, are undoubtedly sufficiently broad to embrace damage of every description. But that they are to be construed in such a sense never has been, and obviously can not properly be, claimed. * * * In short there would be no species of damage, however remote or indirect, which could be traced to the laying out of the road that would not present a legal claim for remuneration. No argument is necessary to show that such is not the construction of that statute. * * *
>
> What, then, is the rule of construction, and what particular species of damage does the statute embrace? We think that an answer to this question is not difficult. It is the direct and immediate damage resulting from the laying out of the highway. This rule excludes all indirect and remote, or what is usually termed mere consequential damage, and also any direct or immediate damage occasioned by any other cause than such laying out. It was, in our opinion, the intention of the legislature, in this statute, to provide remunera-

> tion to individuals only in cases where, in consequence of the laying out of a public highway, they would, if no such remuneration were provided, sustain what in law is denominated an injury, which consists of a violation of one's rights; which would not be the case in the several instances which have been just mentioned, and others of a similar character, which would only be cases of damage without injury (*damnum sine injuria*), but which would occur under the statute in question only where a person, by the establishment of a road over his land, is directly deprived of the use of it, or of the exercise of some right or privilege attached to it, including also the damage done by the laying of it out, to the land connected with that which is covered by the highway and of which it was a part.

The phrase under which appellees' allege the Court of Claims had jurisdiction was doubtless used out of an abundant caution, and there could have been no thought in the minds of the legislature, by its use, that they were to create a right not already granted by the statute. In view of the foregoing, it is respectfully submitted that the Court of Claims was without jurisdiction, and the case should be remandnd to that court to have the petition dismissed.

II.

THIS IS NOT A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE AS CONTEMPLATED BY THE CONSTITUTION.

In order to determine whether there is here a violation of one of the Constitutional guaranties, it becomes necessary to determine the meaning of the words "property" and "taking" as there used. While the authorities dif-

fer somewhat as to their interpretation, there is a general consensus of opinion that injuries to property of the nature of those in controversy are not comprehended by this clause of the Constitution. Water percolating through the ground is not property, but property must be something tangible, continuing, certain, and fixed; but as used in the Constitution, it must be either real or personal, and it is not a privilege or advantage such as one may possess or enjoy by virtue of his citizenship. Were it not so, there is no telling to what extent the Government might become liable and what serious trouble might arise as a result of the improvements consequent upon the advancement of civilization.

The erection of a quarantine station, insane asylum, or fever hospital adjacent to residence or business property would without doubt cause it to become depreciated in value, and serious loss might result to business. Yet no one will seriously contend that this is a taking of property as contemplated by the Constitution.

As a result of the extension of railroads from New York to Washington, innumerable stagecoaches, and wayside inns, have had their source of income stopped, yet can it be said that there is a liability on the part of the railroads for this loss? An injury has occurred, but not such as is contemplated by the Constitution.

The right of eminent domain is well established, and is necessary for the proper functions and continuance of a Government. This right extends not alone to the taking of a fee in land, but also to the taking of a mere easement, even though it be in the nature of a tunnel, as in the case at bar.

Austin, in his work on Jurisprudence (Vol. 2, p. 817), in giving the meaning of the word "property" or "dominion," says that "taken with its strict sense, it denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing. In this sense it does not include *servitus*, nor any right of limited duration." "An animal *ferœ naturæ* may be precisely the same before as after capture, but in his former state no one would speak of him as property." It is thus seen that in order for a thing to be termed property it must be a determinate thing and have two essential features, one "indefinite in point of user," and the other "unlimited in point of duration." Can it be said that a well comes under this category, or does it not to a greater or less extent depend upon the condition of climate and season, fluctuating with the varying deposits of rain and snow, and at times becoming absolutely dry? Because a well may have been full of water for five or ten years it is no reason to believe it will last forever, for a season may come of serious drought when its source of supply will cease; thus it lacks an essential feature to constitute property in the sense used in the Constitution.

The supreme court of Indiana in the *City of Aurora* v. *West* (9 Ind., 74, 83), said as to the taking of private property for public use, that "it is only the taking of specific pieces of the property of an individual by virtue of the right of eminent domain that is prohibited by the Constitution without special compensation." The same doctrine is laid down in almost the same words in the case of the *City of Logansport* v. *Seybold* (59 Ind., 225, 228.)

A serious question arises as to whether the fact of the coincidence of time between the construction of the tunnel and the drying up of the well is in a proper sense a taking.

A leading case on the question as to whether the owner of property which is damaged in consequence of improvements on a street adjacent can recover damages, and in which the question is fully and ably discussed, is that of *Ratcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 Comstock, 195). The court here clearly says that the damage suffered, however serious, in consequence of the improvements, can not be considered within the meaning of the Constitution as private property taken for public use. Upon that point a number of cases were considered and are fully set forth in the opinion of the court.

As far back as 1823, the law was similarly laid down by the supreme court of Massachusetts in the leading case of *Callender* v. *Marsh* (1 Pick., 418, 430). This was an action of trespass on the case for digging down the street alongside plaintiff's dwelling house, laying bare his foundations, as a result of which he was obliged, at a great expense, to build new walls. The court, through the chief justice, in holding that the city was not liable, said:

> There has been no construction given to this provision which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the Government. Thus, if by virtue of any legislative act the land of any citizen should be occupied by

> the public for the erection of a fort or any public edifice upon it, without any means provided to indemnify the owner of the property, the title of the owner could not be divested thereby, and he might maintain his action for possession or trespass against those who are instrumental in the act. * * *
>
> But this course has been confined to the direct loss of property sustained by the individual, and such expenses as are necessarily incident to the very act of taking it.

In *Cushman* v. *Smith* (34 Maine, 247, 257), the court said:

> It is not unusual to find that private property has been greatly injured by public improvements when there has been no attempt to take it for public use. The records of judicial proceedings show that private property in railroads, turnpike roads, toll bridges, and ferry ways has been often greatly injured, and sometimes quite destroyed by the acts authorized by legislation, which, according to judicial decisions, did not violate any provision of the constitution.

The supreme court of Pennsylvania, in an action of trespass brought to recover damages from the city of Pittsburg for injuries done to the cathedral by the cutting down of a street in that city, in holding that recovery could not be had, said through the chief justice:

> The constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed, but it follows not that the omission may not be supplied by ordinary legislation. No property was taken in this instance, but the cutting down of the street, consequent on the reduction of its grade, left the building useless, and the ground on which it stood worth no more than

> the expense of sinking the surface of it to a common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. (*O'Connor* v. *Pittsburg*, 18 Penn. St. R., 187, 190.)

The court, in *Livermore et al.* v. *Jamaica* (23 Vt., 361, 365), said:

> But to bring a case within this provision of the constitution, it should be such a taking as divests the owner of all title to or control over the property taken, and is an unqualified appropriation of it to the public.

The law as above set forth is also found in Sedgwick on the construction of statutory and constitutional law, (2d ed., p. 456).

> It seems to be settled that to entitle the owner to protection under this clause, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter *how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.* This rule has been repeatedly declared in many of the States of the Union. So, in New York, the consequential damages resulting from the raising of the grade of a city street sustained by adjacent proprietors, gives no action against the railroad corporation, acting under the authority of the legislature and with the consent of the city government. So, in the same State, in taking land for railroad purposes, the only right of the party whose property is entered on is to be paid for the land taken, and that without any reference to the fact that the land of which he is deprived is taken

for the construction of a railroad, and that its use by the railroad may be seriously injurious to the rest of his adjacent property.

While the case of *Pumpelly* v. *Green Bay Co.* (13 Wall., 166), which is relied upon by appellees, treats the overflowing of lands as equivalent to a taking, it is obvious that there was, as this court, in *Transportation Co.* v. *Chicago* (99 U. S., 642), in speaking of it, that "there was a physical invasion of the real estate of the private owner, and a practical ouste of his possession." Here there is no such thing.

ONE CAN NOT POSSESS PROPERTY IN THE PERCOLATIONS INTO A WELL.

The doctrine is well established that water which percolates the ground, or which flows in no determinate channel, is not subject to the same rules of law as that above ground. Neither does it constitute a water course, nor can an easement be obtained in its use through long enjoyment, for the owner of the land from which it may have percolated is not supposed to have waived any right which he did not know he possessed until necessity required excavations to be made on his land. The Court of Claims having found in its sixth finding of fact that the well was not "supplied by a distinct vein of water running into it," argument is restricted to the question of percolation.

A leading case on most of the points at issue in this, and to which the Court of Claims gave considerable weight in its opinion, is that of *Acton* v. *Blundell* (12

Meeson and Welsby, p. 324). The defendant in that case sank a coalpit in his own land, about half a mile distant from plaintiff's well, and pumped the water therefrom; as a result, water which would have otherwise supplied plaintiff's well was drawn off. Lord Chief Justice Tindal, in delivering the opinion of the court, recognized the difference in the law governing streams over ground and those under, and on page 350, said:

> But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well.
>
> He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil, and thus by an act which is voluntary on his part and which may be entirely unsuspected by his neighbor he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late that the appropriation of the water has already been made. Further, the advantage on one side and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage or a drinking place for cattle, whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined. In the present case the nearest coalpit is at the distance of

half a mile from the well. It is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar to those which exist in the other, and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust, we feel ourselves warranted in holding upon principle that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is to be governed by analogy therewith. * * *

We think the present case, for the reasons given above, could not be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock or porous ground, or venous earth or part soil, part water; that the person who owns the surface may dig therein and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbors well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which can not become the ground of action.

In *Roth* v. *Driscoll* (20 Ct., 533) the plaintiff had been in the enjoyment of a reservoir on his land for fifteen years, which had been filled by water percolating into it; at a short distance from this he had a well dug, the water from which was drained into the reservoir by means of a syphon; later on, defendant made an excavation on his

ground, as a result of which the supply of water in plaintiff's well decreased, and was too low to be of value or to be drawn off into the cistern. The court, in its opinion, approved the doctrine laid down in *Acton* v. *Blundell*, *supra*, and recognized the distinction between the law governing underground and overground streams. In holding that plaintiff could not recover, it said:

> Each owner has an equal and complete right to the use of his land, and to the water which is in it. Water combined with the earth, or passing through it by percolation or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not in the eye of the law distinct from the earth (p. 541).

In line with the foregoing is the case of the *Ætna Mills* v. *Brookline* (127 Mass., 69, 71) where the supreme court held:

> It is well settled that water, which flows or percolates underground in undefined channels, belongs to the owner of the soil, and he may by a well or other artificial structure appropriate it to his own use, although by so doing he may arrest it on its way to his neighbor's land, or draw it from his neighbor's land into his own. Such water on the land is as much his property as the land itself.

Essentially the same doctrine is laid down in Gould on Waters, section 280.

> Water percolating through the ground beneath the surface, either without a definite channel or in courses which are unknown and unascertainable, belongs to

the realty in which it is found. The rule that a man may freely and absolutely use his property so long as he does not directly invade that of his neighbor, or consequentially injure his clearly defined rights, is applicable to the interruption of sub-surface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress. The land owner may, therefore, make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land. The only remedy for the latter is to sink his own well deeper. He may take the water which would otherwise pass by natural percolation into the adjoining land, or draw off the water which may come by natural percolation from that land, and no adverse right to prevent the exercise of this privilege can be acquired by prescription.

Section 281. * * * If it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they are presumed to be formed by the ordinary percolations of water in the soil.

The case of *Chasemore* v. *Richards* (7 H. of L., 349), was an action brought by the plaintiff in error, a mill owner, who for sixty years prior had used and enjoyed the flow of the river Wandle, which was supplied in part by the water produced by rainfall over a district many thousand acres in extent, which sank into the ground to various depths, and finally found its way in underground courses to the river. The defendants sank a well in the town of Corydon, about a quarter of a mile distant from the river, and used large quantities of the water daily, as

a result of which the underground water was intercepted and the flow into the river materially decreased. The court said (p. 371):

> In the present case the water which finds its way into the defendant's well is drained from and percolates through an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground, and flowed to plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river Wandle; but the question would have been the same if the distance had been 10, 20, or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river and increasing its quantity, to the detriment of plaintiff's mill. Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded or that the present action is maintainable. * * *

Lord Wensleydale, in the same case (385), says:

> The water must be reduced into possession before it can be used, and some mode of reducing it into possession must be permitted by law. If there be no such right underground water is comparatively useless. A man may therefore dig for his own supply or make a well for his own use and that of his family, and in so doing he may deprive his neighbor's land

> of moisture, and even tap a copious spring and prevent it from flowing to his neighbor's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbor, especially as the precise course and direction of such water can seldom be known accurately beforehand. * * * It would seem, therefore, that if the sources of a fountain or spring in an adjoining piece of land were cut off by excavating, in order to get the minerals in any place, it would be deemed by the Roman law to fall within the principle of the improvement of the land and not be actionable.
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> * * * * *
>
> We come then to the conclusion that every man has a right to the natural advantages of his soil, the plaintiff to the benefit of the flow of water in the river and its natural supplies, the defendant to the enjoyment of his land and to the underground waters on it, and he may, in order to obtain that water, sink a well.

In *Haldeman et al.* v. *Bruckhardt* (9 Wright, 514), which was a case in which defendant's spring was destroyed in consequence of a mine having been dug some 330 feet distant and the water being pumped therefrom, the court held that a person in the enjoyment of his land may "cut, drain, or mine, or quarry, though in so doing he interferes with the flowage of water in hidden, unknown, underground channels." "Mining on their land, as they did, was no more than an exercise of their legal rights. If in so doing they interrupted an underground stream which supplied the plaintiff's spring, it was *damnum absque injuria.*

The case of *Wilson* v. *New Bedford* (108 Mass., 261, 265), which is used as an authority by appellees, when read as a whole, is clearly in support of appellant's view of the case, and is as follows:

> The percolating water belongs to the owner of the land as much as the land itself or the rocks and stones in it. Therefore, he may dig a well and make it very large, and draw up the water by machinery or otherwise in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water that would otherwise pass by natural percolation into his neighbor's land and draw off the water which may come by natural percolation from his neighbor's land; and his neighbor may by a wall or other obstruction retain the water which is upon his own land and prevent the water from coming into his soil.

The case of *Wheatley* v. *Baugh* (1 Casey, 528), cited at length by appellees, clearly sustains the contention of appellant that the owner of land may use it for mining or other lawful purposes, although a spring on his neighbor's land, supplied by percolation, may be destroyed thereby, and he will not become liable for damages, unless the injury was occasioned by malice or negligence. The Supreme Court held in this case that recovery could not be had, as the percolation, which supplied the spring on the adjacent land, was interrupted in necessary mining operations. In citing a number of cases in support of this view the court said: "The owner of land on which a spring issues from the earth has a perfect right to it against all the world, *except those through whose land it comes.*"

The case of *Balston* v. *Bensted* (1 Camp., 463), cited by appellees as an authority upon the point that a right of action would lie where a drain was cut whereby the supply of water to a spring was diminished, amounts only to a dictum of an eminent judge, as there was no decision upon the point, one of the jurors having been withdrawn. In addition to this there was a definite water course, which fact alone guided the judge in his opinion.

The case of *Smith* v. *Adams* (6 Paige, Chancery R., 435), also relied upon, was another case where the doctrine of water course would apply, as the spring was supplied not by percolation, but by a "hidden stream passing through the earth." This stream was clearly identified and was cut in making an excavation, hence the case is not at all applicable.

The case of *Chatfield* v. *Wilson* (28 Vt., 49, 54), which was an action on the case for the disturbance of a water course, the water percolating into plaintiff's land, the court in deciding the case approved the doctrine laid down in *Acton* v. *Blundell*, and among other things said:

> The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we can not well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams.
>
> * * * * *
>
> We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the

land as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.

It is not seen how the question of negligence or maliciousness can arise in this case. The tunnel was built for the purpose of furnishing a better water supply to the city of Washington, and no one can even suggest that malice actuated the appropriation therefor or its construction, whatever may have been the result. The fact that the tunnel was abandoned is no reason for the application of the rule of negligence, for the Court of Claims, instead of finding that there was such, found that "the walls are impervious to water," and that it would not seep into it. If the inside of the tunnel is faulty, resulting in its abandonment, what has that to do with the case? It is not claimed that there was a negligent exercise of the use of explosives in blasting, nor is it known that the tunnel is defective anywhere within the radius of half a mile or even a mile of the well. Faulty workmanship or superintendence in the interior construction of the tunnel can not surely influence the conditions acting upon the well.

Appellees quote at length from the case of *Trowbridge* v. *Inhabitants of Brookline* (144 Mass., 139), and lay special stress upon the fact that the city was held liable for the loss of a well which became dry in consequence of the construction of an ordinary sewer. While it may be possible that the city exceeded the statutory authority in the construction of the tunnel, yet the decision seems to be contrary to a well-established and leading case, in which the court held that in the improvements of a city it should

not be held liable for damages resulting to property from the digging down of a street, leaving bare the foundation of the house. The following is an extract from the opinion:

> The streets on which the plaintiff's house stands * * * being legally established, although the right or title in the soil remains in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right, also, to repair and amend the street, and for this purpose to dig down and remove the soil sufficiently to make the passage safe and convenient.
>
> Although, as occurred in this case, serious damage resulted to the property adjacent to the street. (*Callendar* v. *Marsh*, 1 Pick., 431.)

The Chicago, Milwaukee and St. Paul Railroad Company had a right of way across a certain farm, and for the purposes of supplying itself with water a well was dug on its right of way, the spring from which it had been accustomed to draw water not supplying a sufficient quantity. As a result of this construction the supply of water in a spring 165 feet distant was at times almost exhausted. The Supreme Court, in affirming the decision of the lower court that this was a proper exercise of the use of its right of way, said:

> But the defendant in this case is not the absolute and unqualified owner or owner in fee of the land whereon the well was dug. The defendant, however, is owner by grant from plaintiff of "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway." We have not been referred to, nor have we

been able to find any case deciding this question. Upon principle it is very close; and yet we find ourselves agreed in holding with the learned judge who decided the cause below, that under the terms of the conveyance and the facts of the case the defendant had the legal right to dig the well, and can not be enjoined from using the water therefrom for railway purposes.

It must be remembered that if the defendant can be enjoined from digging this well and using water therefrom, it can be enjoined from digging any well on its right of way. For, as we have seen by the rule above stated, if the right to dig the well exists no damages can be recovered because of the diversion of the water from another. In other words the *fact of diverting or obstructing percolating water constitutes no basis of right in or ground for an action by another.* The cause of action arises from the wrongful act of digging the well and not from the consequences which flow from it. For, if the right to dig the well exists, these latter are *damnum absque injuria.* Now, that the digging of wells to supply water to its engines is one of the "purposes connected with the use of a railway," can scarcely admit of a doubt. The right to locate a water-tank upon its right of way can not be more clear than the right to dig a well to supply it; both are equally necessary to operate the road and are fairly embraced in the phrase "all purposes connected with the construction, use, and occupation of the railway." (*Hougan* v. *The Chicago, Milwaukee and St. Paul Railway Co.*, 35 Iowa, 558,560.)

See also *Transportation Co.* v. *Chicago*, 99 U.S., 635,641.

The above case seems clearly opposed to the views laid down in *Parker* v. *The Boston and Maine Railroad* (3 Cush., 107), and upon which appellees also rest great weight.

It is not seen how either the case of *Parker* v. *The Boston and Maine Railroad*, or that of *Trowbridge* v. *The Inhabitants of Brookline*, *supra*, are applicable to the one at bar, for the reason that the acts done in the construction of the tunnel were clearly within the provisions of the statute, and no attempt was made to exceed its authority. No deviation was made from the surveys, but the conditions of the statute were strictly complied with.

The supreme court of Maine, in *Rogers* v. *The Kennebec and Portland Railroad Company* (35 Me., 319, 323), held that the railroad was not liable for any lawful acts done in the construction of their road, although the plaintiff may have been indirectly injured, and cited with approval *Spring* v. *Russell* 7 Greenl., 273; *Callender* v. *Marsh* 1 Pick., 418; *Ratcliff's, executors* v. *The Mayor, etc., of Brooklyn* (4 Comst., 200), and added that the "defendant will not, therefore, be liable for any damages suffered by the plaintiff unless they have exceeded the authority conferred upon them and conducted unlawfully."

The case of *Aldrich* v. *Cheshire Railroad Company* (1 Foster, 359, 363) was where there was an absolute loss of a spring consequent upon the digging of an excavation for a railroad. The court held the plaintiff was not liable for damages, and said:

> There is nothing in the present case to show that the damage complained of was not the necessary consequence of a lawful act. That the commissioners could not probably have anticipated as a matter of fact the cutting off the stream of water in the place excavated for the railroad, and the consequent injury

to the plaintiff, may be an argument against the expediency but not against the obligation of the law in question. As it does not appear that the cuttings and excavations were not made in a proper and reasonable manner, we think the action can not be maintained upon these facts.

Special emphasis has been laid upon the statement that the construction of a tunnel a few feet in diameter and 50 to 170 feet beneath the surface of the ground was an unusual use of the earth, and therefore should not be governed by the ordinary rules of law. Is this more of an unusual use than the sinking of a mine many feet beneath the surface of the ground, covering acres of land? A mere thought is sufficient to convince one that the latter, if any, is an unusual use, and yet the law with hardly an exception holds that the loss of a spring or well supplied by percolations, and which is drained by a mine, is not such a damage as for which recovery can be had, but is a *damnum absque injuria*.

III.

THIS IS NOT A DIRECT INJURY AS CONTEMPLATED BY THE STATUTE.

The drying up of a well supplied by percolation is not such an injury as for which redress may be had under the law. It has just been seen that whatever right a person may have to such supply is only by the grace and pleasure of the neighbor through whose land the water percolates. The right to sue for such loss, if existing at all, must be by

virtue of some statutory provision. It is asserted by appellees that the words "directly injured" is sufficiently comprehensive to include the loss of their well.

The words under which relief is sought were inserted for the very purpose of limiting the liability of the Government to those injuries directly resulting to the property taken and left nothing to inference. It is natural to suppose that the construction of a tunnel of such magnitude would be attended with various injuries to property, both directly and proximately, in consequence of the taking, and also as a remote consequence of its construction. With this in mind and out of an abundant caution, the words "directly injured" were used as contradistinguished from injuries which might consequently or remotely have occurred in consequence of such construction.

If this is a "direct injury," then every farmer within a radius of miles may be said to have a right of action, for the same cause that drained the well drained the moisture from beneath the soil to a greater or less extent, thus reducing its yielding capacity. Surely such a liberal interpretation of these words would prove dangerous, for there is no limitation upon the things to which this right might extend.

We are not to suppose that it was the intention of the legislature to alter the law and make the Government liable for injuries not before recoverable, and without express terms to that effect the words must be construed to mean those persons who were immediately or directly injured in some property right. It has been seen that "where rights are infringed, where fundamental principles

are overthrown, where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce the court of justice to suppose a design to effect such objects." (*United States* v. *Fisher, supra.*)

In the consideration of this question, reference should be had to the first portion of this argument.

Respectfully submitted.

JOHN B. COTTON,
Assistant Attorney-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 552.

THE UNITED STATES, Appellant,

v.

FINNELLA M. ALEXANDER and SOPHIA L. LITTLE.

BRIEF FOR APPELLEES.

JOB BARNARD,
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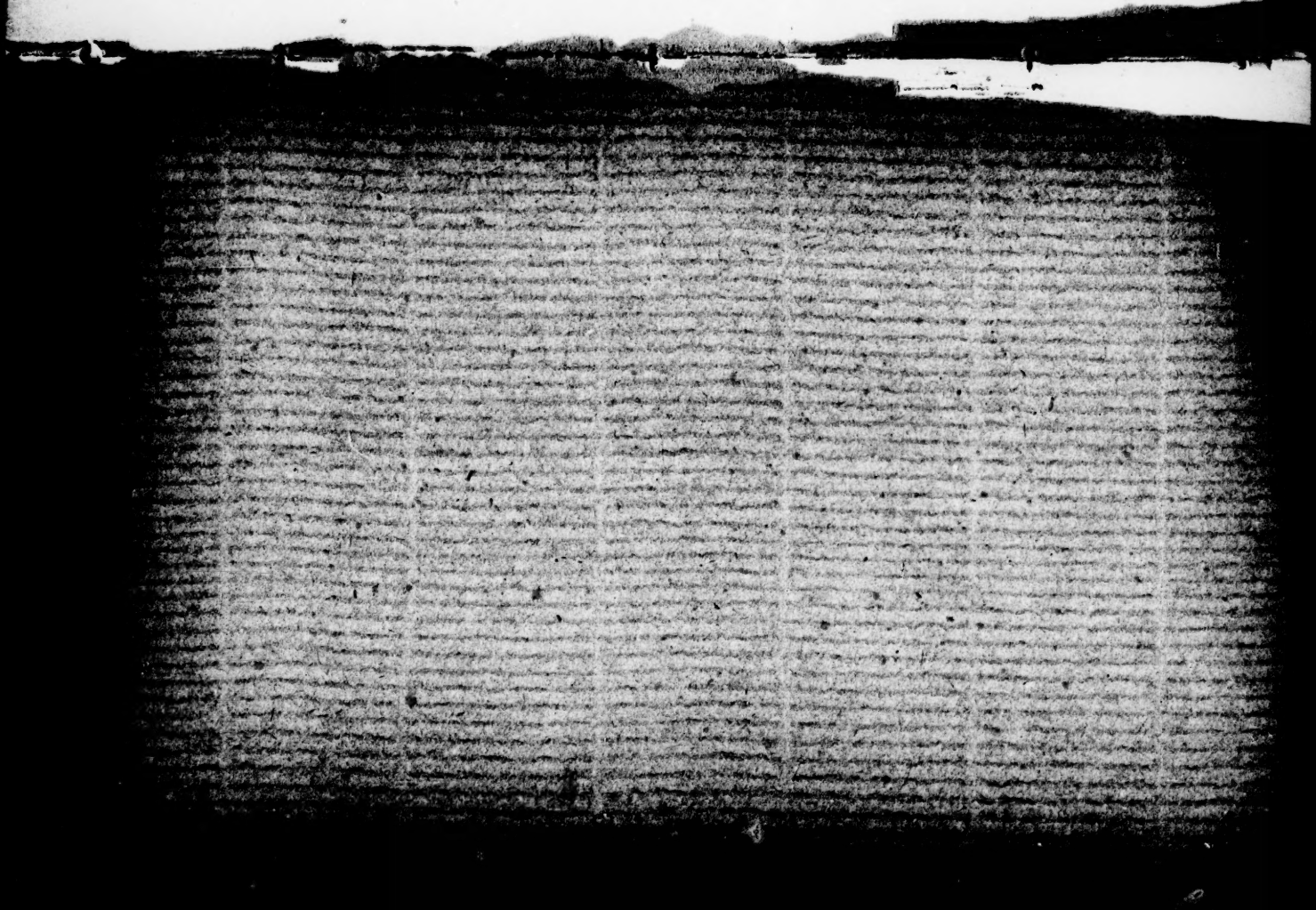

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BRIEF FOR APPELLEES.

1. Statement of the Case.

On the 15th day of July, 1882, Congress passed "An act to increase the water-supply of the city of Washington, and for other purposes," 22 Stat. 168, by the first section of which it was provided as follows:

"That the Secretary of War shall cause to be made a survey and map of the land necessary to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington near Sixth street extended, and for the land necessary for a reservoir at that point, the capacity of which shall not be less than three hundred million gallons, and a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said

land and water-rights, and the land on which the gatehouse at Great Falls stands, by condemnation.

"And in obtaining title to the right of way for the extension of said aqueduct, the Secretary of War and Attorney-General may, in their discretion, secure title to a strip suitable for an avenue over such part of said aqueduct extended as they think proper: *Provided*, That at least one-half in value of such right of way shall be donated or dedicated by the owners to that public use: *And provided further*, That if it shall be necessary to resort to condemnation, the proceedings shall be as follows:

"When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney-General, the chief justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney-General, who, thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then upon the execution of a deed to the United States in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act.

"In making the valuation the appraisers shall only

consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this act.

"The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map who shall for any reason not have been tendered payment therefor as above provided or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

"Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney-General as above directed, be forever barred: *Provided*, That owners or claimants laboring under any of the dis-

abilities defined in the statute of limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

"Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the construction herein authorized; and upon payment being made therefor, or without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States."

By a subsequent act approved February 26, 1885, 23 Stat. 332, the time for filing petitions in the Court of Claims was extended for one year from the passage of the act — that is, to February 26, 1886.

On the 21st of August, 1883, proceedings were begun under the above-cited act of 1882 by the publication of a notice to condemn a right of way for a tunnel. The Government afterwards constructed such tunnel by blasting and digging at a depth of from 50 to 170 feet below the surface.

The claimants in the present case have been since February 28, 1880, and still are, the owners of a tract of land in the District of Columbia, containing about eight acres, and situated in the immediate neighborhood of the tunnel constructed as aforesaid as a portion of the works for the increase of the water supply of the City of Washington. At the time of commencement of operations the claimants' land was improved by a dwelling-house and other buildings, and a valuable well of water to supply the water necessary for family use and other necessary purposes, the said property being occupied by the claimants as a dwelling. The well was sixty feet deep. It does not appear that it was supplied by a distinct vein of water running into it. It had been used for many years before the construction of the tunnel. The tunnel at its

nearest point is about five hundred feet distant from said well. The findings of the Court of Claims state that there is no direct evidence as to the effect of the tunnel on the well, but when they were constructing the same, and blasting about one hundred yards distant from the premises the well became dry and has so remained. It does not appear that there was any other cause affecting the well. The tunnel is impervious to water, and water from the outside does not seep into it. The court finds that "by reason of the construction of said tunnel the said well of water was drained and destroyed, to the damage of claimants in the sum of $1,500, no portion of which has been paid or tendered by the Government."

This suit was instituted in the Court of Claims February 25, 1886, to recover the damages occasioned by the drainage and destruction of the claimants' well in consequence of the construction of the tunnel.

That court, on the first hearing of the case, decided that the grievance complained of constituted a *damnum absque injuria*, and on the 16th of December, 1889, entered judgment accordingly, dismissing the petition.

On the 3d of February, 1890, at the same term of the court, a motion was made by the claimants for a new trial. The motion was argued and submitted on the 12th day of March, 1890. On the 28th of April, 1890, it was sustained in an elaborate opinion delivered by Judge Weldon, in which it was held that whatever might be the rule governing the case independently of the statute, the act of 1882, in opening the court to any person who, by reason of the construction of the works therein directed to be constructed, "shall be directly injured in any property right," sufficiently expressed the intention of Congress to grant compensation to parties injured in the way disclosed by the record in this case.

An order was thereupon entered granting the motion; on the 26th of May, 1890, the case was re-argued and submitted; and on the 9th of June, 1890, judgment was entered in favor of the claimants for the amount of damage sustained by them, $1,500.

From that judgment the present appeal is prosecuted by the United States.

2. Brief of Argument.

It will be observed by an examination of the act of 1882, directing the extension of the Washington Aqueduct, that it is only the land and water-rights at Great Falls, and the land necessary for a reservoir at the eastern terminus in the city of Washington, together with the right of way over the lands through which the aqueduct is to be constructed, that are required to be secured for the United States. It is true that it is further provided that "In obtaining title to the right of way for the extension of said aqueduct, the Secretary of War and Attorney-General may, in their discretion, secure title to a strip suitable for an avenue over such part of said aqueduct extended as they think proper," etc. The findings made by the Court of Claims in this case show that the proceedings taken were only "to condemn a right of way for a tunnel in the neighborhood of this ground." The same fact is shown, if it needs to be shown further than by the findings, by the official report of the Attorney-General of his proceedings under the act, published as Senate Ex. Doc. No. 43, 48th Cong. 2d Sess. where, in the notice of August 21, 1883, the Attorney-General, after citing portions of the statute under which he was proceeding, gave notice under the head of "For extension of Aqueduct," as follows:

"It is proposed to take a right of way for a tunnel whose least depth below the surface of the ground will vary from fifty to one hundred and seventy feet," etc.

It also appears from the list of claims contained on pages 4–6 of the same document, that wherever the tunnel traversed land there was a uniform appraisement of fifty cents per lineal foot of distance traversed, that amount covering the right of way. The point is important, as in the first opinion of the Court of Claims adverse to the present claimants, the case was to some extent treated as if the operations conducted by the United States in the construction of this tunnel had been upon its own land. It was said, for instance, in that opinion, p. 8—

"In this case the United States acquired the absolute title to the land condemned and appropriated for the construction of the tunnel," etc.

The fact, however, as found by the court on both hearings of the case was that the Government proceeded only "to condemn a right of way for a tunnel in the neighborhood of this ground." (Finding III, pp. 8, 16.)

The same fact is also shown, as above stated, by the Attorney-General's published official report of his proceedings under the statute. The case, therefore, is not to be treated as one between adjoining proprietors of land. The United States acquired only the right of way for the construction of its tunnel, and can not claim the privileges of an adjacent proprietor. "It will be observed," as the Court of Claims justly remarks in its first opinion on this case, "that the phraseology of the law contemplates two distinct classes of claimants; first, those whose lands are taken and appropriated by the construction and occupation of the tunnel, and those whose 'property right'

shall be 'directly injured' by the construction of the works."

So, too, as further said by the Court of Claims in the same connection—

"The terms of the statute are sufficiently comprehensive to embrace not only claims for damages growing out of the physical taking or trespass to property, but also for damages which might result from the construction and location of the tunnel, which could be considered at common law consequential and not immediate, unless limited by the term 'directly injured.'"

In this view the Court of Claims is in full accord with the decision of this court in *Great Falls Manufacturing Company* v. *Attorney-General*, 124 U. S. 581, where, treating of this very act, the court says (pp. 596, 597):

"While Congress supposed that a survey and map could be made with such accuracy as to embrace all the land necessary, under any circumstances, for the purposes indicated in the act of 1882, and while provision is made whereby the owner of lands, covered by such survey and map, can obtain just compensation, the act also opens the Court of Claims to every person who, by the construction of the works in question, has been injured in any property right, provided that within a given time such person file his petition in that court, setting forth his right and title and the amount claimed by him as damages."

It is clear, therefore, that although the land of these claimants was not among that embraced in the survey and map, they are entitled to compensation if, by reason of the construction of the tunnel for the extension of the Washington Aqueduct they were "directly injured in any property right." Was the drainage and destruction of the claimants' well, by reason of the construction

of the tunnel, a direct injury in any property right? It can not be denied that a well of water is a property right recognized by the law, any injury to which is a legal injury redressable by the law. To pollute or foul the water of a well is an actionable injury. *Hutchinson* v. *Ennor*, 4 B. & S. 229; *Ball* v. *Nye*, 99 Mass. 582; *Humphreys* v. *Cousins*, 2 Com. Pleas Div. 239.

These propositions, we think, will hardly be disputed by the Attorney-General. It will probably be insisted, however, here as it was in the Court of Claims, that the case is governed by the rule laid down in some of the English cases, the leading one of which is *Acton* v. *Blundell*, 12 M. & W. 324, and followed with more or less hesitation in some of the States in this country, that the digging of a well on a man's own land, or the carrying on of mining operations in the usual and ordinary manner, is a matter of common right, and if in carrying on such operations the incidental effect is produced of drying up wells or hidden springs on the lands of adjacent proprietors, it is *damnum absque injuria*, for which no action can be maintained. Such, it is true, is the later English rule, though in conflict with earlier adjudications both in England and in this country.

In the case of *Balston* v. *Bensted*, 1 Camp. 463, it was held by Lord Ellenborough that the owner of a close can not lawfully cut a drain whereby the supply of water to the spring of an adjoining close is diminished, and an action would lie for such act.

In *Dexter* v. *Providence Aqueduct Company*, 1 Story, 387, Judge Story held the complainant entitled to an injunction to restrain the defendant, who had dug and sunk a deep well, fountain, and pit in an adjacent close, and dug a trench therefrom, and laid pipes leading from the well or fountain to the city of Providence, whereby they diverted

the water from the complainant's spring. Story, J. "was clearly of opinion that *if the gravamen was made out* by sufficient proof the complainant was clearly entitled to the relief."

So, also, in the case of *Smith* v. *Adams*, 6 Paige Ch'y (N. Y.), 435, the court held: "Where a spring is supplied by a hidden stream passing through the earth, the owner of the land above where the water of the spring issues from the earth has no right to divert such water by an excavation or artificial works upon his own land to the injury of the land-owners below, who are supplied by the waters of such spring in their natural course or by prescriptive use." And on page 443 of the opinion Chancellor Walworth says: "The law being well settled that the owner of the superior heritage has no right to detain or divert the water which passes through his land, to the injury of those who were accustomed to receive it upon their lands below, *there can be no reasonable doubt of the complainant's right* to sustain an action in the appropriate tribunal for this abstraction of part of the water of the spring, if he has, in fact, sustained any damage, either directly or by the prospective diminution of the value of the spring lot." And the following cases are cited in support of this part of the opinion: *Arnold* v. *Fort*, 12 Wend. 330; *Williams* v. *Moreland*, 4 Dowl. and Ryl. 583: *Mason* v. *Hill*, 2 Nev. and Man. 747.

And even as late as 1848 the English Court of Exchequer held, as quoted by the Court of Claims in its opinion, page 8 of this record:

"First, that at common law the company was liable to an action for obstructing the water, which actually had formed part of the stream of the river by sinking the well. Secondly, that an action would lie against it at common law for the obstruction of water which did not form part of the river, but was prevented in so doing in

its natural course by the excavation of the well, whether the water was part of an underground water-course or percolated through the strata."

The question here is not, however, whether the United States as proprietor of adjoining lands might not have dug a well on those lands, or conducted thereon mining operations in the usual and ordinary manner without responsibility to those whose wells or springs might thereby incidentally have been drained or dried up. The question here is whether the United States is not responsible when, under authority of a statute, its officers construct a tunnel whose depth throughout its entire course varied from 50 to 170 feet (Senate Ex. Doc. 43, 48th Cong. 2d Sess. p. 7), which in the neighborhood of these claimants was from 150 to 170 feet below the surface (p. 16, finding III), and the bottom of which is stated in the opinion of the court, p. 15, to have been 170 feet below the surface near the premises of the claimants;—where there was an extraordinary use of land, of which the Government was not the owner, but acquired merely a right of way by the terms of the statute authorizing the construction;—and when the statute itself in the very same section granting authority to the officers of the United States to proceed in this manner, makes that grant upon the express condition of the payment of damages to any person who, by the construction of the works therein directed to be constructed, "shall be directly injured in any property right." Upon this question the decision of the Supreme Court of Massachusetts in *Parker* v. *Boston and Maine Railroad*, 3 Cush. 107, is directly in point. In that case a statute provided as follows:

"Every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and mak-

ing and maintaining their road, or by taking any land or materials, as provided in the preceding section."

Construing this Statute that court said:

"And so in regard to the well. The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

The railroad company was accordingly held liable to pay the damages occasioned to the well by the construction of the railroad. This case is in principle identical with the case at bar. There, as here, the property was taken in the exercise of the right of eminent domain, and by authority of statute. There, as here, there were two classes of claims provided for, those for land and material directly taken, and those for damages occasioned by the taking. There, as here, the plaintiff was not among those whose land was directly taken; and there, again, as here, his well was dried up and destroyed by laying out the public work,—there a railroad, here an aqueduct,—across other land through which the taking authority had acquired a right of way, and nothing more. The court said that "the respondents did not own land. They only acquired a special right to and usufruct in it upon the condition of paying all damages which might be thereby occasioned to others." The opinion in this case was delivered by Chief-Justice Shaw, one of the most eminent of all the great jurists of Massachusetts,

sitting with whom were Justices Dewey and Metcalf. The railroad company, the respondent and unsuccessful party in the case, was defended by Rufus Choate. The case is therefore a high authority,—as high as that of any case decided by the courts of England, and certainly not in conflict with any case, either English or American, referred to in the first of the opinions of the Court of Claims, in which the cases from both countries are elaborately cited and learnedly discussed.

In the quite recent case of *Trowbridge* v. *Inhabitants of Brookline*, 144 Mass. 139, another statute was under consideration by the same court, similar in every respect to the act of Congress now under consideration. The case of *Parker* v. *Boston & Maine Railroad Co.* was fully recognized and its authority followed. We quote as follows from the opinion in that case:

"The question presented is whether a town which lawfully takes land and constructs a common sewer therein, whereby a well upon land not taken and not adjoining land taken, is made dry, the well being fed by water percolating through the soil, may be liable to pay damages therefor to the owner of the land in which the well is situated.

"The respondent is liable for 'damages occasioned by the laying; making or maintaining' the sewer. Pub. Sts. c. 50, § 3. The provision in the railroad act is similar. 'Damages occasioned by laying out, making and maintaining its road.' Pub. Sts. c. 112, § 95. The provision in regard to public ways is: 'If damage is sustained by any persons in their property by the laying out." 76 Pub. Sts. c. 49, §§ 14, 68. Section 16, which also applies to sewers, provides that, in estimating the damage, 'regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner.' Under these provisions damages can be recovered for injuring land not taken and not abutting upon land taken. *Dodge* v. *County Commissioners*, 3 Met. 380; *Parker* v.

Boston & Maine Railroad, 3 Cush. 107; *Marsden* v. *Cambridge*, 114 Mass. 490.

"The respondent contends that it had the right of an owner of the land taken to make excavations and thereby drain its neighbor's well; that its act without the authority and protection of the statute was lawful and invaded no right of the petitioner, and gave her no right of action; and that, in accordance with the decisions in England, the statute should be construed to intend only damages which, but for the protection of the statute, could be recovered by action. See *New River Co.* v. *Johnson*, 2 El. & El. 435; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243. But the respondent does not stand, in this respect, in the position of a purchaser of the land, taking the rights of its grantor. It is not the absolute owner of the land, but it took and holds the right to occupy the land for certain purposes, and to do upon it certain acts authorized by the statute. In exercising its rights, the town acts not under the title of the owner, but by virtue of the authority given by the statute, and under the obligation imposed by the statute, to pay all damages occasioned thereby. The petitioner had a right to protect and keep the water in her well; and depriving her of it so as to injure her land was a damage to her. It is no answer that other landowners had the same right in respect to their lands, and that if the petitioner's damages had been in consequence of the exercise of those rights in his land by a landowner, she could not have recovered damages from him. The respondent's right in the land, and its authority to do the act which caused the damage, are given by the same statute which gives a remedy to the petitioner to recover the damages.

"The precise case presented here was decided in regard to a railroad in *Parker* v. *Boston & Maine Railroad, ubi supra*. In that case damages were alleged to have been occasioned in the construction of a railroad, to land not within or adjoining the location of the road, by changing the grade of a highway and by draining a well. It is not suggested that either would be a cause of action at common law. Chief-Justice Shaw says that the main

question in the case is 'whether a party having land with buildings thereon, lying near the track of a railroad, but not crossed by it, can recover compensation for incidental damages caused to his land, by the construction of the railroad and the structures incident to and connected with it.' After discussing the question, he says: 'We are of opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may sue a complaint for compensation for such damage.' In regard to the well he says: 'The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria.* But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

These two cases were carefully distinguished from the English cases, which will doubtless be cited on behalf of the United States, which recognize the right of an owner of land to dig wells on his own property. By reference to the case of *Greenleaf* v. *Francis*, 18 Pick. 117, it will be seen that the Supreme Court of Massachusetts fully recognizes that rule as declared in *Acton* v. *Blundell*, and regards it as by no means inconsistent with the principle declared by it in the two cases just cited of *Parker* v. *Boston & Maine Railroad Co.* and *Trowbridge* v. *Inhabitants of Brookline*, that the construction of a public work under authority of a statute, over land upon which the public authority has acquired a right of way only, raises a responsibility in damages to those whose wells are drained or destroyed by such construction. The two classes of cases are quite distinct, and depend upon different, though entirely con-

sistent principles. *Boston Belting Co.* v. *Boston*, 152 Mass. 307. *Onset Railway* v. *County Commissioners*, 154 Mass. 395, 400, 401.

It appears, too, that by the law of France, if a well is injured or destroyed by the construction of public works, the proprietor is entitled to recover the damage occasioned thereby. Delalleau, Traité de l'Expropriation, Brussels, 1835, § 836, p. 226, says that:

"If, in direct consequence of the expropriation, the proprietor is obliged to construct certain works, it is evident that the administration ought to account to him for the expenses which they shall occasion to him."

And, as an example of this principle, he adds, in § 840, that:

"A judgment of the Council of May 12, 1824, has decided that the establishment of the canal of L'Ourcq having rendered useless the wells of certain inhabitants of La Villette, there was a requirement to pay them the expenses to be met for the construction of new wells."

The law of America, whose written Constitution expressly forbids the taking of private property for public use without just compensation, must certainly not be less liberal than that of France.

The cases recognizing the right of a proprietor of land to dig in it for wells, even though he thereby incidentally drain the well of a neighboring proprietor, always make the qualification that the digging must be for the reasonable and proper use and enjoyment of the land. *Haldeman* v. *Bruckhardt*, 45 Pa. St. 521. He can not do so either maliciously or negligently, and if he does he is liable to an action; and such cases, whether English or American, as deny to the landowner the right to recover damages for the draining of a well through the construction of another well on land of an adjoining proprietor,

do in no respect proceed upon the ground that injury to a well is not an "injury to any property right," but quite the contrary. The ground of such decisions is that the defendant land owner has the same right as the plaintiff to sink his well or dig his mine in a usual and proper manner. A stranger may not interfere with a well, and if he does, he is liable in damages.

"The percolating water belongs to the owner of the land as much as the land itself, or the rocks and stones in it." *Wilson* v. *New Bedford*, 108 Mass. 265.

In the present case it is hardly necessary for us to go so far as to insist that the work was negligently and improperly done, although Congress has in terms condemned the "mismanagement" of that work, and has directed an investigation for the purpose of fixing the responsibility for such "mismanagement." (Joint Resolution authorizing the Secretary of War to protect the Washington Aqueduct Tunnel, October 19, 1888, 25 Stat. 632, 633.) It is sufficient for us to claim, as we do, and as manifestly appears by the findings and opinion of the Court of Claims, that the work in question was an unusual and extraordinary use of the land, not to be governed by the rules regulating ordinary well-digging and mining, and the incidental damages sometimes occasioned by that ordinary and natural use of the land. In one of the cases most strongly recognizing the right of a proprietor to dig a well without responsibility to adjacent proprietors, the distinction herein drawn is fully admitted, and clearly stated as follows:

"Neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is, that water, like air, is of such a nature that no one

can have an exclusive right in it. In the process of evaporation and condensation it is sent in refreshing showers all over the earth. In its descent to the ocean it necessarily passes from one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor. In this description of property it is, therefore, peculiarly necessary that each should be mindful of the necessities and rights of others. The owner of land on which a spring issues from the earth has a perfect right to it against the world, except those through whose land it comes. He has even a right to it, as against them, until it comes in conflict with the enjoyment of their own property. Strangers can not destroy it, even though it be derived from lands which do not belong to the owner of the spring. Even a railroad corporation, armed by law with the eminent domain, and having power to take private property for the construction of its road, is answerable to the owner of a spring for destroying it, although its destruction be caused by excavations on the land of an adjacent proprietor. *Parker* v. *The Boston and Maine Railroad Company*, 3 Cush. Rep. 107. But while the court in that case held that the corporation was liable, on the ground that the destruction of the spring was not required for the purposes of the owner of the land through which the excavation was made, the principle was fully recognized that each proprietor has a right to make a proper use of his own land, and that sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss arises, it is *damnum absque injuria. Parker* v. *The Boston and Maine Railroad*, 3 Cush. Rep. 107; American Railway cases, 553." (*Wheatley* v. *Baugh*, 25 Pa. St. 533.)

While our researches have not enabled us to discover that the precise question involved herein has ever been adjudicated by this court, there are several cases which in principle are nearly allied to it.

In *Pumpelly* v. *Green Bay Co.* 13 Wall. 166, it was held that under a provision of the Constitution of Wisconsin,

"The property of no person shall be taken for public use without just compensation therefor," the backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation. In that case it was argued in language which will doubtless be substantially adopted in behalf of the Government in the present case, as follows (p. 177):

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and the damage is a consequential result of such use of a navigable stream as the Government had a right to for the improvement of its navigation."

To this the court made the following response:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In *Chicago* v. *Taylor*, 125 U. S. 161, it was decided that—

"Under the provision in the constitution of the State of Illinois adopted in 1870, that 'private property shall not be taken or *damaged* for public use without just compensation,' a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value." (Syllabus.)

In that case the damage consisted in the obstruction of access from the plaintiff's place of business to the street, and an occasional flooding with water, impairing the value of the premises as a place for handling and storing coal, for which it had previously been used.

In *Shepherd* v. *Baltimore and Ohio R. R. Co.* 130 U. S. 426, the action was upon a statute of Ohio providing that "Every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground," etc.

Under this language it was held that:

"To entitle a property owner to recover for injury to his property in Ohio by reason of the location of a railroad on a public street, road, or alley, it is not necessary under the provisions of Rev. Stats. Ohio, § 3283, that the property should be situated upon the street so occupied; but it is sufficient if it is near enough to it to be injured by the location and occupation."

So, too, in *New York Elevated Railroad* v. *Fifth National Bank*, 135 U. S. 432, this court, following the ruling of the Court of Appeals of New York in *Story* v. *New York Elevated Railroad*, 90 N. Y. 122, held that an elevated railroad

was liable to the owners of land abutting on the street for the discomforts and inconveniences in the occupation of the building caused by the erection of the defendant's structure.

Thus the decisions of this court in analogous instances of injury to real property by the construction of public works, have been favorable to the position of these claimants. The question as to the effect of the act of 1882 in establishing the liability of the United States for injuries such as those complained of in this case is so ably discussed in the opinion of the Court of Claims on the motion for new trial, as to relieve us from any extended treatment of that branch of the case. The question after all reduces itself to this: Did Congress intend to apply against the United States the rule which appears to obtain in England, and to have been followed in some, but not all, of the States of this country, that adjoining proprietors are not responsible to each other for injuries caused by the construction and operation in the usual and ordinary manner of wells and mines? Or, on the other hand, was it its intention to apply the rule adopted in Massachusetts and in France, as we have shown above in cases of this exact description, holding the government liable for the drying up of wells by the construction of public works? Reason would seem to dictate the reply that the Government of the United States must be held to have adopted the rule most broadly protective of the rights of the citizen against arbitrary interference or destruction by governmental power. *United States* v. *Lee*, 106 U. S. 196, 208.

It can not be that property rights which could not be invaded without compensation under a monarchical form of government, as France was when the decision above referred to was made, can be ruthlessly trampled upon

here without redress. While we have insisted that independently of the special statute, the United States is liable wherever in the exercise of the right of eminent domain it destroys a well, yet even if we are mistaken in this position, there is abundant authority to show that in the passage of a special statute like this, opening the doors of the court to all persons directly injured by the construction of the works, it must have been the intention to waive all defenses which might otherwise have been relied upon and to submit to the courts simply the question of the extent and amount of the damage done. *Cross* v. *United States*, 14 Wall. 479; *Roberts* v. *United States*, 92 U. S. 41, 48, 49; *United States* v. *Steever*, 113 U. S. 747, 755; *Fendall* v. *District of Columbia*, 16 C. Cls. 106; *Carroll* v. *District of Columbia*, 22 C. Cls. 104; *Walton* v. *United States*, 24 C. Cls. 372; *Gray* v. *District of Columbia*, 24 C. Cls. 426.

In all these cases the submission of the case by Congress to the courts has been held as indicative of the intention of Congress to establish a broad and liberal rule of liability, unless, as in *United States* v. *Cumming*, 130 U. S. 452, the submission was restricted by a direction that the "court shall pass upon the law and facts as to the liability of the United States," though on even this qualification of the rule the court was by no means unanimous. (P. 455.)

The final conclusion of the Court of Claims in this case, adjudging the Government liable for the destruction of the well, is, therefore, we submit, amply supported by principle, and its judgment should be affirmed.

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